Supreme Court, U. S.
FILED
APR 25 1979
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IN THE

Supreme Court of the United States

March Term, 1979

No. 78-1627

LARRY P. CRAMER,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FOURTH DISTRICT.

Larry P. Cramer, Pro Se,
Fairview Farm,
Sidell, Illinois 61876,
Petitioner.

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AUTHORITIES CITED

Cases

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Yates v. United States, 354 U. S. 298 (1957).

Statutes

Ill. Rev. Stat., Ch. 38, §§ 8-1, 8-2.

Constitutional provisions

Constitution of the United States, Amendments VI and XIV

Other authorities

Devitt & Blackmar, Fed Jury Instr., 2d Ed., 1974.

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No.

LARRY P. CRAMER,
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THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FOURTH DISTRICT.

The petitioner larry P. Cramer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Fourth District, entered October 12, 1978.

OPINION BELOW

The opinion of the Appellate Court, reported at 64 Ill.App.3d 688 and 381 N.E.2d 827. appears in the Appendix hereto.

JURISDICTION

The judgment of the Appellate Court was entered on October 12, 1978. A timely petition for leave to appeal was denied without opinion by the Supreme Court of Illinois on January 25, 1979, as appears in the Appendix hereto. Certiorari is sought on the basis of 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the petitioner was denied trial by jury and due process of law by the intervention of the trial court at his own initiative in the jury's deliberations to re-present the State's evidence.

2. Whether the petitioner was denied due process of law by being convicted on a general verdict when some of the counts which could have been the basis for conviction were dismissed after trial.

3. Whether the petitioner was denied trial by jury and due process of law where the jury was never instructed nor informed as to what overt acts in conspiracy were alleged or required to be proved.

4. Whether the petitioner was denied due process of law by the State's intentional concealment of evidence favorable to the defense under the Brady rule.

5. Whether the petitioner was denied due process of law and his rights under the Sixth Amendment in being tried and convicted on an indictment which failed to state a crime.

If certiorari is granted, the petitioner will brief and present the following additional point:

6. Whether the petitioner was denied due process by the monumental magnitude of cumulative erroneous evidentiary rulings of the State trial court on state and federal issues.

STATUTORY PROVISIONS INVOLVED

Ill. Rev. Stat., Ch. 38, § 8-1:

> Solicitation
> (a) Elements of the offense.
> A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense.

Ill. Rev. Stat., Ch. 38, § 8-2:

> Conspiracy
> (a) Elements of the offense.
> A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

Constitution of the United States, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation . . ..

Constitution of the United States, Amendment XIV

> . . . (N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was indicted on six general counts of solicitation and four counts of conspiracy to murder his wife, with each count of conspiracy alleging separate overt acts. The indictment was returned December 13, 1974, in Champaign County, Illinois.

The solicitation counts alleged the statutory language and pleaded no facts. The sufficiency of the indictment and the violation of due process was first raised in the post-trial motion in the trial cout, and argued again before the Appellate Court, which ignored the issue. No Illinois court has decided whether pleading the statutory language may properly charge solicitation and comply with federal due process.

The jury was never instructed nor told what overt acts in conspiracy were charged or required proof. The jury was also given general verdict forms.

The petitioner objected throughout and submitted proper forms of charge. Again, before the Appellate Court, the petitioner argued this court's line of cases following the Stromberg doctrine.

The State's evidence consisted primarily of four tape recordings of conversations between the petitioner and a co-conspirator accomplice, together with the testimony of the accomplice with some corroboration from a one-night girlfriend of the accomplice. The defense consisted of the testimony of the alleged victim, the petitioner's wife, who supplied an alibi for the initial solicitation and for one overt act, and who testified as to the harmonious marital relationship.

After the jury had deliberated on the case 22 hours, the trial court on its own iniative recalled the jury to the courtroom and inquired if replaying the tape recordings would help the jury reach a verdict. After receiving an affirmative response from the jury, the tapes were replayed, all over vigorous defense contentions that the court was coercing a verdict. State and federal cases were cited regarding the constitutional infirmity of the procedure utilized.

The petitioner was convicted upon general verdicts of solicitation and conspiracy.

Before the Appellate Court, the petitioner argued the Stromberg doctrine of this court to

the effect that a general verdict based upon a multi-count indictment cannot stand constitutionally when one of the counts which could have been the basis for conviction is invalid.

At a hearing on the post-trial motion, the trial court dismissed two counts of conspiracy because they involved overt acts after the accomplice had become a police operative.

After the post-trial motion was heard, but prior to sentencing, certain evidence favorable to the petitioner under the Brady rule came to the attention of counsel for the petitioner who filed a motion under Brady v. Maryland. This evidence is recited in the Reasons section following. The trial court heard evidence for three days then declined jurisdiction. The due process violation of the Brady rule and line of cases was argued in the trial court and in the Appellate Court, although the Appellate Court Opinion evaded the issue entirely.

The petitioner was sentenced to concurrent terms of from one to three years on each charge.

REASONS FOR GRANTING THE WRIT

I. Whether the petitioner was denied trial by jury and due process of law by the intervention of the trial court at his own initiative in the jury's deliberations to re-present the State's evidence.

The replaying of the tape recordings - the sine qua non of the State's case - catapaulted a speedy verdict 45 minutes later.

Where a trial court has made unwarranted inquiries of the jury, implied that the jury had to decide the case, implied an opinion, summarized the issues without mentioning the defendant's defense, given the dynamite charge followed by a speedy verdict, or repeated the dynamite charge when not requested to do so by the jury, coercion has been found. United States v. Seawall, 550 F.2d 1159 (1977); United States v. Harris, 391 F.2d 348 (1968), cert. den. 393 U. S. 874; United States v. Williams, 447 F.2d 894 (1971); United States v. Contreras, 463 F.2d 773 (1972); United States v. Diamond, 430 F.2d 688 (1970).

Rehearing any portion of the trial may have been "help" to the jury. If the court had asked if it would help to have the testimony of the petitioner's wife read to them, the court would have been emphasizing the evidence most helpful to the petitioner and could have led the jury to believe that the court felt the petitioner was innocent. But the court singled out the piece of

evidence most helpful to the State.

Not only did the court's action suggest to the jury that the court favored a guilty verdict and that the court felt the jury should hurry up and decide, but the procedure unquestionably placed additional and undue emphasis on the tapes. Calling the jury from the jury room to the courtroom, excluding spectators, and requiring the defendant to sit over his objection in view of the jury while the tapes were blared over amplifiers must have had a dramatic effect.

This was just quasi-legal jury tampering which has consistently been condemned in cases and situations far less odious than here.

Some years ago the courts of this country uniformly refused to permit any communication to the jury once deliberations commenced. Gradually, courts have over time permitted more and more judicial discretion to aid the jury in the form of reading transcripts of testimony, giving the Allen instruction, etc.

Not only was the unilateral intrusion of the trial court here into the jury's deliberative process a violation of federal due process which should be corrected by this court, and not only was the trial and Appellate Court rulings a departure from the standards set forth in the federal cases cited above - either of which reasons should be sufficient for this court to grant

certiorari, if not summary reversal - but also the development of the area of the extent and the manner to which a trial court can go in dealing with a jury's deliberations should be addressed by this court in the exercise of its supervisory authority to guide the lower courts. Trials should never be conducted in this manner by any court.

The outrageous conduct of the trial judge here in so brazenly implying how the jury should decide makes this a perfect case for this court to address the question of standards to be used in court-jury relations during deliberations.

2. Whether the petitioner was denied due process of law by being convicted on a general verdict when some of the counts which could have been the basis for conviction were dismissed after trial.

The petitioner sought to have the trial court give "guilty" and "not guilty" verdict forms as to each conspiracy count, since each count specified different overt acts at different times and places. Instead, a single general verdict form as to "guilty" or "not guilty" of conspiracy was given.

Two of the four conspiracy counts were dismissed after trial for failure to state crimes, since there could have been no conspiracy after one of two co-conspirators began work as a police

agent - a point the petitioner had argued to no avail during trial.

The basis of the jury's verdict was thus concealed from the court, as in the landmark case of this court in Stromberg v. California, 283 U. S. 359 (1931), where a general verdict conviction under a three-part statute was reversed where one part was later held unconstitutional, and it was impossible to tell whether the verdict was based on the valid part of the charge or the invalid part.

Yates v. United States, 354 U. S. 298 (1957), said at 312:

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

Yates was convicted on a general verdict where one of the multiple charges was later held to be barred by the statute of limitations.

The court cannot presume a conviction to be based upon a surviving ground, Williams v. North Carolina, 317 U. S. 287 (1942). If it "could have been" based on the invalid charge, the conviction does not pass constitutional muster, Street v. New York, 394 U. S. 576 (1969). Accord: Cramer v. United States, 325 U. S. 1

(1945); Terminiello v. City of Chicago, 337 U. S. 1 (1949); United States v. Driscoll, 449 F.2d 894 (1971).

The ruling of the Illinois courts is categorically contrary to the rulings of this court, and a flagrant case of judicial usurpation, which makes the granting of certiorari desirable if not compelled.

3. Whether the petitioner was denied trial by jury and due process of law where the jury was never instructed nor informed as to what overt acts in conspiracy were alleged or required to be proved.

Closely entertwined with the trial court's use of general verdict forms was the trial court's refusal of petitioner's request to define the issues in conspiracy to include the overt acts which were alleged and had to be proved, since the overtact is a part of the crime under the Illinois statute. Chapter 38, section 8-2 of the Illinois Revised Statutes states:

> A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

The jury was not told in the instructions what overt acts were charged. The jury was not told in argument what overt acts were charged. The jury was never read the charges. They were left with nothing but speculation as to what overt acts were in issue.

This fundamental error was further compounded by references in testimony to various acts of the petitioner and the co-conspirator which were never charged but which could have been construed as overt acts.

Under the court's instructions the jury would have been compelled to have rendered a guilty verdict if they, for example, believed the petitioner's purchase of insurance policies was an overt act, even though that was no part of the indictment.

Probably, no federal case has ever been tried under a conspiracy statute which required an overt act without the jury having been informed what overt acts were charged. (See, 1 Devitt & Blackmar, Fed.Jury Instr., 2d Ed., pp. 431-33, 444-45.) But conspiracy prosecutions are infrequent in Illinois.

While the Appellate Court avoided the petitioner's argument on the general verdict proposition of the Stromberg doctrine, that court seems to concede that the issues instruction was erroneous. Yet, two of the three panel

members found the error harmless because of proof of guilt, ignoring the petitioner's lengthy argument that there was reasonable doubt as a matter of law. This begs the question. Guilt of what? Acts proved but never charged? Acts charged but later dismissed. The circular reasoning in this anomalous situation has the majority of the Appellate Court substituting its own judgment for that of the jury to find guilt!

Thus, the majority of the panel presumes that the jury would have found guilt of the overt acts if they had only been apprised as to what they were. Such an aberration from established reviewing court principles cannot be countenanced.

The petitioner is entitled to a jury trial. It is not the function of any court of review to guess the jury would have found guilt of certain facts, when the jury itself has not done so.

4. Whether the petitioner was denied due process of law by the State's intentional concealment of evidence favorable to the defense under the Brady rule.

Prior to sentencing, the petitioner filed a motion for a new trial based on prosecution violations of Brady v. Maryland, 373 U. S. 83 (1963), which had just come to the attention of

defense counsel. The trial court conducted an evidentiary hearing, then later ruled that it had no jurisdiction, a position that had not been advance by the State, and which the petitioner had not been called upon to address.

This motion was directed to the State's second most important witness, one Patty Cozad, who was used to corroborate the accomplice's testimony as to various ventures, including his picking up a gun, buying a knife, and making several trips to a Chicago hotel one weekend for meetings with the petitioner concerning plans to kill the petitioner's wife while she and the petitioner were guests in the hotel.

Cozad's testimony was important, because it was presented to corroborate the testimony of an unreliable accomplice witness with pending felony charges, prior convictions, judicial admissions of perjury, etc - a witness who desperately needed corroboration. Instead of the jury being informed that Cozad was nearly as unsavory a character as the accomplice witness, her testimony was foisted upon the jury as that of a clean-cut ordinary citizen with no motive to fabricate, when the State knew better.

Testimony at the evidentiary hearing and matters of record disclosed the following undisputed facts:

a. The State filed its initial Answer to Discovery on December 30, 1974, listing as one of the State's witnesses a Patty Cozad, address unknown, and stating that the State had no information in its possession favorable to the defense under the Brady rule.

b. An Illinois Bureau of Investigation agent interviewed Patty Cozad on January 2 and on January 3, 1975, and she had four conferences with the Assistant Attorneys General prior to trial, which commenced March 31, 1975.

c. The petitioner filed a Motion for Compliance with the court's discovery order on January 31, 1975, alleging that the State was concealing Patty Cozad, and the court directed the State to furnish an address.

d. At no time prior to trial did the State furnish an address, despite repeated requests of defense counsel to the prosecutors.

e. The State knew that Patty Cozad was an extensive user of narcotics, had been for several years, and used them during the time period of her testimony.

f. Patty Cozad at the time she testified had pending in the same circuit court a charge of possession of a controlled substance, under the name of Patlyn Stafford.

g. "Patty Cozad" was an alias; her correct name was "Patlyn Stafford."

h. Cozad had a recent prior conviction involving a crime of dishonesty.

i. No memorialization was made by the State of any of their four interviews with Cozad.

j. Cozad sold controlled substances on March 7, 1975, to an Illinois Bureau of Investigation agent, in a controlled sale under the surveillance of the same agent who interviewed her on January 3, 1975, and who transported her to various meetings with the prosecutors - the agent in charge of investigating this case. However, Cozad was not arrested or formally charged with this offense until August 25, 1975, after the post-trial motion in this case had been denied.

k. Cozad was a some time room-mate of, and associate drug-user with one Mary Johnson - a person mentioned by name many times during the trial as a person the State implied the petitioner was having an extra-marital affair with, although no witness so testified.

l. At no time did the State furnish any information to the defense about Cozad other than her name alone, which was an alias.

The State's position was, at the Brady evidentiary hearing, that Cozad just by chance met the accomplice witness the day before he took her to Chicago overnight to witness his comings and goings; that Cozad did not know the petitioner; that Mary Johnson knew the

petitioner and Cozad, but not the accomplice witness. Thus, the State fell back on the theory that it was merely an amazing Ripley's Believe It or Not coincidence that out of the several hundred thousand women in East Central Illinois, the petitioner just happened to choose to have an affair with one who turned out to be a roommate of a person who, unbeknownst to the petitioner met and was with the petitioner's accomplicejust long enough to become his chief corroboration witness, although they never met or had contact before or after.

The petitioner was deprived of the opportunity to investigate the likely conspiratorial relationship between the accomplice witness, Cozad, and Johnson vis a vis the petitioner, and the obvious potential for coercion and manipulation of Cozad by the Illinois Bureau of Investigation agent.

Armed with this knowledge, the defense could have taken an entirely new thrust, expecially as to the connections among the triumvirate of Cozad, Johnson, and the accomplice witness.

Cozad's background and activities set forth above was also usable at trial under Illinois law, and the State even advised her that her drug use might be gone into during cross-examination.

Under different circumstances, but akin in principle to this case, the holdings of this court in Smith v. Illinois, 390 U. S. 129 (1968), and Alford v. United States, 282 U. S. 218 (1930), stand for the proposition that refusal of the trial court to permit the defendant to cross-examine as to the true name or place of residence of a prosecution witness is error. Alford reversed a conviction without a showing that the cross-examination, if pursued, would have brought out facts discrediting the witness. In Smith, the trial court permitted defense counsel to ask the principal witness for the State if "James Jordan" - the name under which he had testified - was his real name. He testified negatively. But the court refused to allow inquiry as to his real name or his address. On this basis alone the conviction was reversed.

Concealment of Cozad's address and her real name was tantamount to concealment of her identity. Hence, the State's conduct here goes even beyond the Brady area and into the heart of the rights guaranteed an accused by the Sixth Amendment.

Under the standards of United States v. Agurs, 96 S. Ct. 2392 (1976), this case could be analyzed in two different ways, either one making certiorari appropriate.

While there was no specific request for Cozad's narcotics use and dealings, nor for her pending cases or cases under investigation, there was a specific request before the court once and several times directly to the prosecutors for her address. Concealing her address and real name, which was specifically requested and ordered, thus served to conceal her criminal background from discovery by investigation.

As to the one conspiracy count where Cozad fig red prominently, this additional information could have created a reasonable doubt - assuming arguendo that the jury even convicted on this count - since the co-conspirator's testimony was sharply disputed by the alleged victim, the petitioner's wife, who provided an alibi for the petitioner.

Moreover, to the extent that Cozad's testimony bolstered the testimony of the co-conspirator as to anything, it bolstered it as to everything.

Analyzed as either a category two Agurs case - where the concealed information "might have" affected the verdict - or a category three Agurs case - where the concealed information must create a reasonable doubt, due process was denied, and the petitioner should be granted a new trial.

This was a close case as viewed from the

evidence and the length of jury deliberations, and the scales tipped to the prosecution only with the intervention of the court. This should be borne in mind in assessing the effect of the concealed information.

Without resorting to Agurs principles, this court should uphold the Smith and Alford propositions, if they are indeed good law.

It was well stated in United States v. Butler, 567 F.2d 885 (1978):

> When the government permits a witness to parade himself in false colors, and the truth is discovered, the motion for a new trial should be granted if the false testimony (or nondisclosure) could, in any reasonable likelihood, have affected the judgment of the jury.

5. Whether the petitioner was denied due process of law and his rights under the Sixth Amendment in being tried and convicted on an indictment which failed to state a crime.

The petitioner was tried and convicted on six general counts of solicitation which alleged that between February and December 13, 1974, the petitioner either encouraged or requested one Charles O. Weathington to murder Judy Cramer - the statutory language, with no facts alleged.

The Illinois solicitation statute, chapter 38, section 8-1, provides that "A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense."

Two points are made here: (1) solicitation, like perjury, is a crime of words, and the words or the substance of them must be alleged in the indictment to comply with the Sixth and Fourteenth Amendments; and (2) the statute is so vague that facts must be alleged beyond the statutory language in order to state a crime.

When a crime is committed by words the indictment must set them forth verbatim or in substance. The Illinois Supreme Court so held in a perjury case. People v. Aud, 52 Ill.2d 368 (1972) The same result obtained in a case of unlawful representation to practice law. People v. Peters, 10 Ill.2d 577 (1957)

A vague statute like this solicitation statute must be, in any case, pleaded with facts rather than statutory language. (The Illinois Supreme Court has so ruled, not only in the Aud and Peters case, supra, but in a reckless driving case, People v. Green, 368 Ill. 242 (1938); and in a contributing to the dependency of a child case, People v. Chiafreddo, 381 Ill. 214 (1942). The statutes involved there were no less vague than the solicitation statute here.

This court has itself held in Russell v. United States, 369 U. S. 749 (1962), a case involving 2 U. S. C. § 192 - refusal to answer questions of a congressional committee -

that pleading the language of the statute was insufficient to state a crime - that the indictment must show the times and places of the hearings and the precise questions the defendant refused to answer.

It is a violation of due process to be convicted upon a defective indictment. United States v. Robinson, 495 F.2d 30 (1974).

The Appellate Court again evaded this issue entirely. Not only has the petitioner been deprived of due process in the rulings of the trial court on this and the other preceding issues, but he has been denied appellate review on many of these points. If a defendant complies with procedural requirements, he should have his allegations of state and federal statutory, constitutional, and case law irregularities and violations of due process at least ruled upon by a reviewing court, especially when some of these matters are clearly in the petitioner's favor. However, at no stage has the Illinois judicial system shown even the slightest interest in rectifying the fundamental injustice done to the petitioner and to the law.

The granting of certiori would cure that.

Numerous and critical errors of every conceivable nature pervaded these proceedings at every stage. No modicum of fairness required by due process has been extended to the petitioner.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of Illinois for the Fourth District.

Respectfully submitted,

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THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, *v.* LARRY P. CRAMER, Defendant-Appellant.

Fourth District No. 14061

Judgment affirmed.

Opinion filed October 12, 1978.

Mr. JUSTICE TRAPP delivered the opinion of the court:

Defendant appeals his convictions of conspiracy to commit murder (three counts), and solicitation to commit murder (six counts), entered upon jury verdicts.

Defendant's post-trial motion alleged some 70 errors, most of which are argued in defendant's brief. Upon *pro se* oral argument it is contended that the cause should be reversed for accumulated error and the argument was directed to the several errors discussed severally hereafter.

The sum of the allegations of the indictment is that between February 1974 and December 13, 1974, defendant conspired with a client, Weathington, to murder defendant's wife and that within such period defendant agreed and requested and encouraged Weathington to commit murder. (Ill. Rev. Stat. 1973, ch. 38, pars. 8—1 and 8—2.) On November 18, 1974, Weathington advised both the police and the State's Attorney of the schemes which are the subject of the prosecution and cooperated with them in the recording of certain conversations between the conspirators. He testified in behalf of the prosecution, both before the grand jury and at trial. Defendant's wife testified in behalf of the defendant. Defendant did not testify.

The trial court instructed the jury upon the issues of conspiracy in the language of IPI Criminal No. 6.04. The operative words considered here are, "Third. That an act in furtherance of the agreement was performed by any party to the agreement."

Defendant objected to the giving of the instruction for the reason that it failed to set forth the specific acts alleged in the indictment, and that it failed to require that one or more of the overt acts so alleged be proven beyond a reasonable doubt. The testimony includes and concerns acts of defendant and Weathington, any one of which may be deemed overt acts in furtherance of the conspiracy but which are not actually charged or alleged in the indictment.

The defendant also tendered an instruction which modified IPI Criminal No. 6.04, by stating in such third paragraph the overt acts which the indictment alleged were performed by defendant. The indictment did not allege any overt acts performed alone by the co-conspirator, Weathington. Defendant's tendered instruction was refused.

Section 8—2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 8—2) defines the elements of conspiracy. That definition concludes with the sentence:

"No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is *alleged* and proved to have been committed by him or by a co-conspirator." (Emphasis supplied.)

During the period when the co-conspirator, Weathington, was cooperating with the police, certain telephone conversations of the alleged conspirators were recorded. The recordings were played before the jury during the course of the trial.

Shortly after retiring the jury requested a transcript of the several recordings. The trial judge concluded that such transcripts were not offered into evidence and could not be sent to the jury. The jury then requested that the tapes and a machine to play them be provided. The request was denied because of the judge's concern that the tape recordings might be damaged or erased.

After the jury had deliberated some 20 hours, the trial judge and counsel conferred on the record. At that time the judge stated that he would ask whether or not the jury was making progress, saying:

"I propose to take the jury into the courtroom and inquire if they are making progress and if he says no, the foreman, and I propose to inquire of the foreman if playing the tapes would be helpful in arriving at a verdict. If he says yes, I then propose to ask each of the jurors as well. If each member of the jury says yes, I'm going to play the tapes for them *in camera* in the courtroom with only the defendant, his attorney, attorney for the people and the court being present."

Defendant's counsel objected to the playing of the tapes at such time after the prior jury request had been refused, asserting such to be an abuse of discretion and argued that playing the recording at that time would be a prejudicial emphasis upon the testimony. He also asked that certain defense cross-examination and evidence be reread to the jury. The court advised that he would not allow such defense testimony to be reviewed unless the jury asked for it.

The jury was returned to the courtroom and, upon inquiry, the foreman advised that he was of the opinion that the jury *was* progressing in its deliberations. The judge then asked:

"Would it help, in your opinion, in this case if you were to hear the tapes played here in the courtroom?"

The foreman responded affirmatively as did each juror upon individual inquiry. The recordings were again played and the defendant's objections, together with a motion for a mistrial, were denied. The jury returned a verdict within 45 minutes. The issue is preserved in the post-trial motion.

The prosecution argues that there was a proper exercise of discretion in suggesting the replay of the recording because the previous denial may have discouraged renewal of the request although the jury may have continued to be uncertain or confused.

Certain other issues preserved in the post-trial motion and briefed and argued on appeal are noted.

Defendant argues that the issues instruction, IPI Criminal No. 6.04, was erroneous in that, while it required the prosecution to prove that the conspirators agreed to commit the crime, it did not require the State to prove that they intended to agree. The words "intended to agree" appear to be directed to the notion that they agreed to conspire. Thus, defendant alleges that the trial court erred in denying his tendered instruction, IPI Criminal No. 6.03, modified to read, "intends to, and does agree with another." He cites P. Marcus, *Criminal Conspiracy: The State of Mind Crime*, 1976 U. Ill. L. F. 627.

We find that the study is directed toward the law required in Federal convictions. 18 U.S.L.A. §371 (1966) provides, "If two or more persons conspire • • • to commit any offense • • •." We note that the former Illinois statute (Ill. Rev. Stat. 1961, ch. 38, par. 139) defined conspiracy in the language "[i]f any two or more persons conspire or agree together • • •"

The present statute defining conspiracy uses different language. Section 8—2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par 8—2) provides, "A person commits conspiracy when, with intent that an offense be committed, *he* agrees with another • • •." (Emphasis supplied.)

Under the prior Illinois statute it was held that at least two parties with a common criminal intent are necessary to conspiracy, and where there are but two parties an acquittal of one required the discharge of the other. (*People v. Cohn* (1934), 358 Ill. 326, 193 N.E. 150.) It was held that more than one person must be guilty to sustain a conviction. *People v. Nathanson* (1945), 389 Ill. 311, 59 N.E.2d 677.

The present statute, however, specifically provides that these holdings are no longer effective. The present statute states in section 8—2(b) that:

"It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:

(1) Has not been prosecuted or convicted, or

• • •

(4) Has been acquitted, • • •." (Ill. Rev. Stat. 1973, ch. 38, par. 8—2.)

Citing the present Illinois statute defining conspiracy, Marcus notes:

"Traditionally, courts analyzed the state of mind of *both* conspirators (the conspiracy requirement referred to two or more conspirators) to determine if more than one defendant intended to agree. If only one of the two conspirators meant to agree, and the other 'conspirator' only feigned agreement or had actually contacted the police, the state of mind necessary for a conspiracy would not exist; at least two parties must intend to enter into the conspiratorial relationship. More recently, however, the trend has

been away from requiring proof of an agreement by more than one defendant. The focus now is on the state of mind of the defendant on trial. This so-called 'unilateral approach' allows for the conviction of the defendant even if his 'co-conspirator' never intended at any time to enter into an agreement with the defendant. Typically, the unilateral approach statutes require that a court only focus on the intent of the accused to enter an agreement. The mental state of the defendant's co-conspirator is largely irrelevant." 1976 Illinois Law Forum 627, 628.

•1 By reason of our present statute we conclude that the intent to agree which defendant argues is encompassed within the language which requires allegations and proof that defendant agreed with another to commit an offense.

•2 Defendant argues that since the prosecution introduced evidence of motive, the trial court erred in denying his tendered instruction modifying IPI Criminal No. 3.04 to include "The State is required to prove a motive for the commission of the crime charged." The prosecution did not tender IPI Criminal No. 3.04. In *People v. Enright* (1912), 256 Ill. 221, 234, 99 N.E. 936, 941, the court said that if the accused committed the act, the question whether he had a motive or what it was is immaterial. While evidence tending to show the existence or nonexistence of the motive is admissible and the People may so show, they are under no obligation to do so. The opinion continues to state:

> "If the People claim that a motive existed inducing the commission of the act it must be proved, and, like any other circumstance, cannot be inferred, but as they are not required to show any motive a jury *should not be* informed that failure to show it tends to prove that the crime was not committed. * * *." (Emphasis supplied.) (256 Ill. 221, 234, 99 N.E. 936, 941.)

In *People v. Manzella* (1974), 56 Ill. 2d 187, 306 N.E.2d 16, the court stated that IPI Criminal No. 3.04 is to be used where the State had not attempted to prove motive. We conclude that defendant's argument misstates the rule of *Enright* and *Manzella*.

Defendant urges that the court commi ed reversible error in admitting into evidence what is termed evidence of other crimes. We summarize rather than detail the substance of the matter.

Weathington testified to the circumstances initiating the solicitation and conspiracy. Defendant had represented him as a client which apparently entirely consisted of criminal matters. The witness called at defendant's office in February 1974 to request a loan of $20. Defendant asked whether there was security and Weathington stated that he had some marijuana. Defendant inquired whether it was of good quality and smoked some in a pipe. There was no objection. The testimony is that during the course of the transaction defendant inquired whether the witness would like to make some money and the latter expressed interest. Without then naming the victim defendant proposed that Weathington assist in getting rid of someone. In a series of subsequent conversations,

Weathington was told the identity of the victim and various sums to be paid to Weathington were discussed. There followed suggestions and discussions regarding a series of schemes and methods for causing the death of the victim. The last proposal was that Weathington find a "hit man."

Weathington further testified that during later conversations he spoke to defendant regarding the then scheme of carrying out the conspiracy. At that time defendant stated that it was necessary to delay their preparations for the reason that there was some difficulty arising from his extramarital affair with the wife of a client. Defendant made objection and argued that the testimony was inadmissible, asserting prejudice. The prosecution suggested that the evidence was admissible to show motive and defendant's motions for mistrial were denied.

The prosecution failed to produce any further testimony concerning the extramarital problem which tended to establish motive. At the close of the prosecution's case, the court orally instructed the jury that "any evidence received in regards to the use of marijuana or immoral conduct was presented for the limited purpose of showing the relationship between the defendant and Mr. Weathington."

The written instructions included the language of IPI Criminal No. 1.01(6) regarding evidence admitted for a limited purpose. Defendant argues that the instruction was so delayed that the prejudice was not cured.

We agree with the trial court's conclusion that the testimony was relevant to the issues. In *People v. Manzella* (1974), 56 Ill. 2d 187, 196, 306 N.E.2d 16, 20, defendant argued prejudicial error in the admission of evidence of other assaults upon the victim. The evidence was held to be admissible, the court saying:

> "It is true, nevertheless, that evidence relevant to the main issue, and which serves to place the defendant in proximity to the time and place of the offense and which aids or establishes identity, and tends to prove design, motive, or knowledge, is admissible as an exception to the general exclusionary rule barring such evidence."

In *People v. Durso* (1968), 40 Ill. 2d 242, 239 N.E.2d 842, defendant, who was charged with murder, urged error in admitting evidence of narcotics transactions. The court stated the test for admission of evidence of other crimes was whether the evidence was so closely connected with the main issue that it tends to prove guilt of the crime charged.

The opinion in *People v. Tranowski* (1960), 20 Ill. 2d 11, 16, 169 N.E.2d 347, 349, states that other "crimes" which are wholly independent of and disconnected from the crime charged are not admissible, but continued:

> "But a corollary of the rule is that evidence, relevant to the main

issue, which serves to place a defendant in proximity to the time and place, aids or establishes identity, and tends to prove design, motive or knowledge, is admissible. [Citation.] Resolution of the conflict between the rule and the corollary depends on whether the evidence of other crimes is so closely connected with the main issue that it tends to prove the accused guilty of the crime for which he is being tried."

•3 The evidence at issue here was clearly intertwined with the negotiation and the progress of the conspiracy. It did not concern wholly independent and unrelated conduct clearly apart from the offenses charged. The transaction concerning a loan "secured" by marijuana was the point from which defendant opened discussion or suggestion of the acts constituting the objective of the conspiracy. That transaction was of a nature that might suggest to defendant that Weathington would be receptive to the proposals and did, as the trial judge concluded, explain the relationship between the parties.

The testimony concerning the extramarital affair originated in statements by defendant to Weathington explaining the cause for delay in the further discussion of the plans for carrying out the conspiracy. It was presented to the jury in the context of the course of the developing conspiracy, rather than introduced as wholly extraneous to the relation between the parties.

At the time that defendant objected to the testimony, the prosecution suggested the showing of evidence of motive. At that time the trial judge had no way of ascertaining the fact. At the close of the case in chief when all evidence regarding motive was disclosed to him he did instruct the jury of the limited purpose in the consideration of the jury.

•4 The argument that the rulings were too long delayed is not persuasive. Logically, it seems that orally instructing at the close of all prosecution evidence would more effectively impress than rulings scattered throughout the several days of testimony. We find no reversible error upon these issues.

Defendant argues that the trial court erred when it denied a motion to suppress certain electronic recordings, called "tapes," for the reason that it was not done in compliance with the then statute (Ill. Rev. Stat. 1973, ch. 38, par. 14—2(a)). That statute prohibited the use of eavesdropping devices unless such was done with the consent of one party and at the request of the State's Attorney. On four separate days telephone calls from Weathington to defendant were made from an investigating office. The recording device was attached to the telephone in that office and had no connection to defendant's telephone or its connecting lines. An assistant State's Attorney was present on each occasion.

The State's Attorney testified that he made a request for monitoring of

each call and that he had designated a named assistant to be in charge of such portion of the investigation. Each act of monitoring followed the request for that recording by the assistant State's Attorney and he was present. A fifth occasion involved the arrangement whereby Weathington wore a device which transmitted the conversation by radio and which was recorded.

The record shows no indiscriminate broad authority given to police officers to monitor defendant's conversations at their own discretion as in *People v. Porcelli* (1974), 25 Ill. App. 3d 145, 323 N.E.2d 1. In *People v. Richardson* (1975), 60 Ill. 2d 189, 328 N.E.2d 260, the Supreme Court determined that the State's Attorney had a large discretion in administering his duties in the authorization of eavesdropping activities. In *People v. Marlow* (1976), 39 Ill. App. 3d 177, 350 N.E.2d 215, the State's Attorney's request included the delegation of authority to a named assistant to authorize that it was done. The recorded evidence was held admissible. Here, as there, the assistant State's Attorney designated and specified the date and occasion for each recording. (See also *People v. Holliman* (1974), 22 Ill. App. 3d 95, 316 N.E.2d 812.) Defendant's argument that the State's Attorney gave "permission" rather than made a request is without merit.

•5 The several recordings occurred throughout a period of some three weeks. Defendant argues that that was an unreasonable period of time to authorize such recordings. We find the record supports the conclusion that each recording was made upon separate and distinct authorization.

•6 We have examined defendant's argument that there was not sufficient foundation to show the quality and accuracy of the recordings to permit their admission into evidence. We find no merit upon this point.

Defendant's argument that it was error to play the tapes in their entirety during the course of the trial is directed to the fact that they included conduct and references to conversations between Weathington and defendant which we have heretofore held admissible.

Defendant argues that the trial court erred in permitting the State's Attorney to play six portions of the tapes during the course of his argument. This record simply shows argument by the State's Attorney with a transcript notation that a portion of a tape was played. Neither the text heard nor the duration of the recording can be ascertained. Defendant likens the playing of the recording to the reading from a trial transcript during the course of an argument. Such has been considered to be error for the reason that there was an overemphasis of selected testimony. In *People v. Birger* (1928), 329 Ill. 352, 160 N.E. 564, however, it was held permissible for a State's Attorney to make a paraphrased recapitulation of testimony where his recollection had been refreshed

from notes or a transcript. In *People v. Morse* (1975), 33 Ill. App. 3d 384, 342 N.E.2d 307, *cert. denied* (1976), 426 U.S. 953, 49 L. Ed. 2d 1191, 96 S. Ct. 3179, it was held that a brief reference to the transcript was not reversible error. In *People v. Davies* (1977), 50 Ill. App. 3d 506, 365 N.E.2d 628, the court concluded that it was within the discretion of the trial court to permit the reading of a trial transcript during closing argument. That opinion noted the recent decision in *People v. Pierce* (1974), 56 Ill. 2d 361, 308 N.E.2d 577, which determined that it was within the discretion of the trial court to permit a jury to have a review of testimony after it retired to deliberate. That opinion states that the use of paraphrased recollection by an attorney penalized accuracy without necessarily reducing the emphasis of such testimony, and under the rationale of *Pierce* found no abuse of discretion in permitting the reading of a transcript which was "not so extensive as to unduly emphasize the testimony at issue • • •." (*Davies*, 50 Ill. App. 3d 506, 514, 365 N.E.2d 628, 634.) From this record it cannot be ascertained whether the recording played was so extensive as to produce a substantial prejudice.

The two principal issues have been stated but not yet reviewed.

•7 The trial court instructed the jury upon the issue of conspiracy in the language of IPI Criminal No. 6.04. The members of the panel agree that such instruction was error, in the light of the language of section 8—2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 8—2), providing:

> "No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator."

A majority of the panel concluded, however, that the evidence of defendant's guilt is so overwhelming that the error may be treated as harmless. Judge Trapp is of the opinion that the error is such a deviation from the law and precedent that reversal is required. He so concludes upon the authority of *People v. Dorsey* (1936), 363 Ill. 403, 2 N.E.2d 321; *People v. Galvan* (1976), 42 Ill. App. 3d 390, 356 N.E.2d 139, and *People v. Dickerson* (1976), 41 Ill. App. 3d 464, 353 N.E.2d 427.

In *Dorsey*, defendant was charged with conspiring to purchase for others the conspirator's securities at exorbitant and extortionate prices. The trial court refused defendant's tendered instructions designed to limit the jury's considerations to the allegations of a bill of particulars restricting the charge to allegations that certain securities were fraudulent and worthless. The trial court submitted the issues upon allegations regarding the extortionate charges. In reversing and remanding, the reviewing court held that the issues must be limited to the allegations stated in the bill of particulars, stating:

> "None of the given instructions refer in any way to the bill of particulars or to the charge set forth in it. Obviously, the defendants were entitled to have the jury instructed on the issue as to which the prosecution was limited and upon which they were tried, and not upon some other and different issue." 363 Ill. 403, 408, 2 N.E.2d 321, 323.

In *Galvan*, defendants were charged with rape and conspiracy to commit aggravated kidnapping. The reviewing court found plain error arising in the fact that the issues instruction upon the charge of conspiracy was framed in terms of a conspiracy to commit rape and contained no mention of the elements of a conspiracy to commit aggravated kidnapping. In reversing and remanding, the reviewing court said that the jury must be instructed upon the offense charged.

In *Dickerson*, defendant was charged with receiving stolen property. The court determined that an element of that offense was defendant's knowledge of the fact that the property was stolen when he received it. The sum of the instructions, however, would permit the jury to convict defendant upon a separate offense of possession of stolen property. The latter was an offense for which defendant was not charged. The court said:

> "It is elementary, however, that a defendant may be convicted of only the offense with which he is charged, not of another offense with which he might have been charged." (41 Ill. App. 3d 464, 467, 353 N.E.2d 427, 428.)

It was determined that the error required reversal. In the light of the requirements of the statute, we conclude that there was reversible error in giving the issues instruction tendered by the defendant.

•8 The majority of the panel also conclude that any error arising from the trial court's offer to replay, and to the subsequent replaying, of the "tapes" of defendant's telephone conversations with Weathington was harmless beyond a reasonable doubt by reason of the fact that the evidence of guilt was overwhelming. Judge Trapp concludes that upon this record, the trial court abused its discretion for the reason that the jury might readily infer and conclude that the trial court considered such evidence critically important.

No cases have been found which report instances where a trial judge has proffered to review the selected testimony after the jury has retired. The opinion in *People v. Pierce* (1974), 56 Ill. 2d 361, 308 N.E.2d 577, established the rule that it is within the discretion of the judge to determine whether a jury's request to review testimony heard during trial be allowed. A dissenting opinion would adopt the view of the ABA Standards, Trial by Jury §5.2 (1968), that the trial judge must grant the

jury's request where the evidence directly relates to an issue before the jury. The question here, however, is not whether the court abused its discretion in refusing the jury's request to play the recording, but rather whether there was an abuse of discretion in volunteering and directing the jury's attention to specific prosecution evidence, and inquiring whether it would aid in reaching the jury's verdict.

The latter view is founded upon consideration of the authority of *People v. Baltimore* (1972), 7 Ill. App. 3d 633, 288 N.E.2d 659, and *People v. Golub* (1929), 333 Ill. 554, 165 N.E. 196.

In *Baltimore*, the jury reported that it was unable to reach a verdict in a murder trial after 15 hours of deliberation. The judge inquired whether the jury could reach a verdict without regard to the death penalty. The reviewing court concluded that as a matter of plain error the inquiry might be construed by the jury to indicate an opinion of guilt and for such reason reversed and remanded.

In *Golub*, the jury had been deliberating for 4 hours. The foreman reported that they had not reached a verdict. The trial judge remarked that the jury should have no difficulty in reaching a verdict upon the evidence presented. The opinion states:

> "The juror, as well as the judge, has an independent duty to perform, and he ought to be left free to pronounce his own conviction. A verdict hastened by the action of the judge, however worthy the motive, cannot be the result of that deliberation which the law guarantees. Remarks by a trial judge calculated to effect the rendition of a verdict without affording the jury an opportunity for careful consideration are unwarranted and often lead to great abuse. Whether the error is harmless or prejudicial depends upon the facts of the case." 333 Ill. 554, 561, 165 N.E. 196, 199.

In the context of whether the error was prejudicial or harmless, the opinion noted that the trial judge's remarks did not either expressly, or by implication, indicate that the jury should reach a particular conclusion. The record did not disclose how long the jury deliberated after they had retired a second time.

Here, the testimony concerned events occurring over a period of 11 months. The report of the foreman that the jury was progressing to a verdict negates any suggestion that the jury was then unable to reach a verdict, or was confused or uncertain concerning the evidence. The record discloses that the jury had continued to deliberate some 20 hours after the refusal of the initial request to hear the recording. This suggests that the jury members were not prevented from reaching a verdict because they could not recall or were uncertain about the testimony heard. This record does show that a verdict was returned within 45

minutes following the replaying of the "tapes." As distinguished from the facts in *Golub*, it is reasonable to conclude that the playing of the "tapes" upon the suggestion of the trial judge had a prejudicial consequence.

For the reasons stated herein, the judgment of the trial court is affirmed.

Affirmed.

CRAVEN and REARDON, JJ., concur.

Judgment of the trial court

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
)
vs.) Criminal Nos. 74-X-1967 and 75-X-159
)
LARRY P. CRAMER,)
Defendant.)

And now come the People of the State of Illinois by Assistant Attorney Generals Locher, Burnham and Resch, and said Defendant, Larry P. Cramer, is present in open Court with his Attorney, Donald M. Tennant.

At 2:50 P.M. the jury returns into open Court with the following verdicts:

"We, the jury, find the defendant Larry P. Cramer, Guilty of Solicitation to Commit Murder."

"We, the jury, find the defendant Larry P. Cramer, Guilty of o Commit Murder."

Jury polled at request of Defendant's Attorney.

Judgment entered on the findings of the jury.

April 16, 1975. HOWARD LEE WHITE, Judge.

Judgment of the Supreme Court of Illinois

Leave to appeal denied, 74 Ill.2d xx (1979), on January 25, 1979. No written decision. No written order.